

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs April 25, 2007

STATE OF TENNESSEE v. CALVIN GREGORY SMITH

Direct Appeal from the Criminal Court for Sumner County
Nos. CR397-2004, CR6-2005 Jane W. Wheatcraft, Judge

No. M2006-01939-CCA-R3-CD - Filed April 20, 2007

The appellant, Calvin Gregory Smith, pled guilty in the Sumner County Criminal Court to two counts of domestic assault, one count of stalking, one count of harassment, and one count of aggravated assault, and his sentences were suspended. Thereafter, the trial court revoked the appellant's probation for failing to provide proof of employment, failing to pay court costs, and violating a "no violent contact order." On appeal, the appellant challenges the revocation of his probation. Upon review of the record and the parties' briefs, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JERRY L. SMITH and D. KELLY THOMAS, JR., JJ., joined.

David Allen Doyle (at trial) and Michael Gene Anderson (at trial and on appeal), Gallatin, Tennessee, and Eric Fox (at trial), Hendersonville, Tennessee, for the appellant, Calvin Gregory Smith.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Lawrence Ray Whitley, District Attorney General; and Bryna L. Grant, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

On May 6, 2004, the Sumner County Grand Jury returned indictment number CR397-2004 charging the appellant in count one with the domestic assault of Brandy Treenery, in count two with public intoxication, in count three with disorderly conduct, in count four with the domestic assault

of Dusty Butcher,¹ in count five with the stalking of Alicia Huff, in count six with the harassment of Jason Ramsey, and in count seven with the harassment of Rickey Troup. Thereafter, on August 26, 2004, the appellant pled guilty to counts one, four, five, and six, all misdemeanors, with the remainder of the charges dismissed. Pursuant to the plea agreement, the appellant received a sentence of eleven months and twenty-nine days for each offense. The domestic assault sentences were to be served concurrently with each other. The sentences for stalking and harassment were to be served concurrently with each other but consecutive to the sentences for domestic assault. The appellant's sentences were immediately "suspended to M-CHRA probation," with certain conditions of probation imposed. While on probation, the appellant was to have no violent contact with the victims, maintain full-time employment, and pay \$100 per month toward court costs.

On January 6, 2005, the Sumner County Grand Jury returned indictment number CR6-2005 charging the appellant with the aggravated assault of Butcher on October 22, 2004, barely two months after he was released on probation. On August 11, 2005, the appellant pled guilty to the aggravated assault of Butcher, and he received a sentence of five years to be served consecutively to the sentences for the 2004 offenses. The appellant's sentences were again suspended, and he was placed on "state probation." The previous conditions of probation were again imposed, with the appellant specifically warned to have no violent contact with Butcher.

On October 13, 2005, a probation violation warrant was filed against the appellant, stating that he was arrested on October 12, 2005, on domestic assault charges, he failed to provide verification of lawful employment, he failed to provide verification of his court cost payments, and he violated an order to have no violent contact with Butcher. At the violation hearing, Butcher testified that she and the appellant had been in an "on-and-off relationship" for ten years, and they had two minor children. Butcher stated that after the appellant was released on probation in August 2005, he came to live with her. For approximately two months, they had no problems; however, the appellant began to drink and use drugs. The appellant developed a "really bad attitude," and sometimes he cursed, threatened, or pushed Butcher.

At 3:00 or 4:00 a.m. on October 12, 2005, Butcher woke to find the appellant on top of her, wanting to have sex. Butcher refused because "things weren't working out with him being there." The appellant kept trying to persuade her, telling her that if she would not have sex with him then she "needed to please him orally." Butcher again refused. Butcher stated:

So he was playing with my breasts, and I kept trying to get him off of me. That is when he got really mad, grabbed my nipple, twisted it, and pulled me up by my boob, by my breast and, you know, clawed me all over my chest, telling me I was going to do something, because he was not going to go without having something done to him or me to do something to him. And he pulled my hair once, told me . . . he was going to kill me if I woke any of the kids up.

¹ In the record, this individual is also referred to as Shannon Butcher.

Next, the appellant took Butcher's cellular telephone and went downstairs. She heard him talking to someone on the telephone, telling them "I want to get out of here right now; come get me before I do something stupid and go to jail."

Butcher was scared and took a cold shower to calm herself. Afterward, she went downstairs, and the appellant gave her the cellular telephone. Butcher made a "smart comment," and the appellant punched her in the chest.

Butcher returned to her bedroom, crying. When she went back downstairs, the appellant was passed out in the floor. Butcher was scared of what the appellant might do if she called the police, so she called the appellant's probation officer and reported the incident. Shortly thereafter, the probation officer arrived, and five or ten minutes later officers from the Sheriff's Department also arrived.

Butcher then went to the probation office. The probation officer used a digital camera to photograph bruises and scratches Butcher suffered during the incident. A couple of days later, the appellant called someone from jail who then called Butcher "on three-way." During the conversation, the appellant told Butcher that he had not done anything wrong. The appellant said that Butcher was jealous because he was leaving. He told her that she should tell police that she had filed a false report and that the bruises were a result of rough sex.

Laura Williams, the appellant's probation officer, testified that the appellant first reported on August 24, 2005, and he signed paperwork and submitted to a drug test. Williams asserted that the appellant never provided proof of employment, and he never provided a receipt reflecting that he was paying his court costs. The appellant told Williams that he was searching for employment, but he never supplied Williams with proof that he was searching for or had obtained a job. Williams said that on September 9, 2005, the appellant was supposed to begin paying court costs of \$100 per month. She stated that the appellant did not make his September and October payments.

The appellant testified that he found a job three weeks after he was granted probation in 2005, working through Adecco, a temporary service. The appellant maintained that during his first meeting with Williams, he told her that he was looking for employment. At his second meeting, he told Williams he had found work, but he did not provide her with a pay stub to verify his employment. The appellant acknowledged that he had not paid his court costs for "[n]o reason in particular. I just hadn't gotten around to it."

The appellant said that on the morning of October 12, 2005, he came home and went upstairs to get Butcher's telephone. Butcher was in bed. The appellant stated, "I just got in the bed with her to play with her, just to mess with her like usual." The appellant maintained that he was not doing anything out of the ordinary, but Butcher "got an attitude" and "got smart." The appellant got out of bed, grabbed a telephone, and went downstairs. He called someone who was supposed to pick him up later that day. Two hours later, the appellant told Butcher that he was moving out and was just waiting for a ride. Shortly thereafter, Williams and members of the Sheriff's Department

arrived.

At the conclusion of the revocation hearing, the trial court remarked that “[t]he incident as was described by Ms. Butcher is a lot more credible than the excuse for bad behavior that was given by the [appellant].” The court found that the appellant had not provided his probation officer with proof of employment. The court further found that the appellant had provided no reason for not paying his court costs. Therefore, the trial court revoked the appellant’s probation and ordered him to serve his eleven month and twenty-nine day sentences and his five-year sentence in the Tennessee Department of Correction. On appeal, the appellant challenges the revocation of his probation.

II. Analysis

Upon finding by a preponderance of the evidence that the appellant has violated the terms of his probation, a trial court is authorized to order an appellant to serve the balance of his original sentence in confinement. See Tenn. Code Ann. §§ 40-35-310 and -311(e) (2006); State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991). Furthermore, probation revocation rests in the sound discretion of the trial court and will not be overturned by this court absent an abuse of that discretion. State v. Leach, 914 S.W.2d 104, 106 (Tenn. Crim. App. 1995). An abuse of discretion exists when “the record contains no substantial evidence to support the trial court’s conclusion that a violation has occurred.” State v. Conner, 919 S.W.2d 48, 50 (Tenn. Crim. App. 1995).

On appeal, the appellant contends that the proof at the revocation hearing revealed that the appellant had obtained employment. Additionally, the appellant argues that the proof revealed that he had “only missed one payment when the violation warrant was issued.” Finally, the appellant denies that he assaulted Butcher. Therefore, the appellant contends that the trial court should not have revoked his probation.

Our review of the record reveals the appellant admitted that he never provided to his probation officer verification of his employment. Moreover, the appellant testified that his only reason for not paying his court costs was that he “never got around to it.” Finally, the trial court found that Butcher’s testimony was more credible than the appellant. During his guilty pleas, the appellant was advised that as a condition of his probation, he was to have no violent contact with Butcher. The proof does not preponderate against the trial court’s finding that the appellant violated the conditions of his probation.

III. Conclusion

Finding no error, we affirm the judgments of the trial court.

NORMA McGEE OGLE, JUDGE